

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-2074/77-4136

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

UNITED STATES OF AMERICA, ex rel.
DER-RONG CHOUR,

Petitioner,

- v -

BENEDICT J. FERRO, District Director,
Immigration and Naturalization Service,
Buffalo, New York, or any other person
having the said petitioner in his custody,
IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

Docket No. 77-2074

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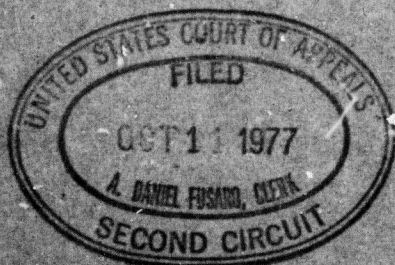
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REPLY BRIEF OF PETITIONER

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: On Appeal from the
: United States District
: Court for the Northern
: District of New York

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: On Petition for Review
: from the Board of
: Immigration Appeals

REPLY BRIEF OF PETITIONER

Dated: New York, New York
October 7, 1977

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REPLY BRIEF OF PETITIONER

I. PRELIMINARY STATEMENT

The instant appeal deals with the alleged deprivation of constitutional, statutory and regulatory rights at petitioner's

deportation hearing as reflected in two materially contradictory transcripts, one of which specifically reflects an Immigration Judge misstating the applicable regulation and informing the non-English-speaking petitioner-alien that ". . .you are not authorized to have such a person [an attorney] you can go ahead without one and speak for yourself. . . ." (A-43).

In addition, it is concerned with whether petitioner is eligible for an adjustment of status.¹

II. COUNTERSTATEMENT AND DIFFERENTIATION OF FACTS AS CONSTRUED BY RESPONDENT

A. Materially Contradictory Transcripts Cannot Be Glossed as "Substantially Correct".

That respondents choose in their Statement of Facts (Respondents' Brief, p. 3, et seq.) to ignore materially contradictory transcripts of the deportation hearing by divining that Judge Port "concluded" that petitioner was aware of his right to retain counsel "irrespective of which transcript is correct" (Respondents' Brief, p. 6, n. 9) and further choose to buttress their divinations by references to private conversations presumably between an Assistant U. S. Attorney and an interpreter that the transcripts are "substantially correct" (references in patent

(1) The instant appeal does not pertain to petitioner's alleged failure to file alien address cards (Respondents' Brief, p. 5, n. 7), alleged failure to seek prior approval of the respondents before seeking employment in this country (Respondents' Brief, p. 3, n. 3) [But see, Wandering Between Two Worlds: Employment Discrimination Against Aliens, 16 Va. J. of Int'l L. 355 (1976); M. Coolidge, Chinese Immigration (1909)] or various descriptions of petitioner as "surfacing" here or there.

violation of this or any appellate court's rules which limit litigants to a record) (Id.) can only be termed playing fast and loose with the present record and no species of simple persuasive argument, as is further borne out below.

B. "Undisputed" Waivers

The respondents' claim that petitioner's response to the Judge's garbled expression of petitioner's right to retain counsel is "undisputed" (Respondents' Brief, p. 6, n. 9) and that somehow the "indisputability" of the response to the garbled expression of the right transmutes to the indisputability of the Judge's initial expression of petitioner's right to retain counsel is nonsensical.

Petitioner's "indisputable" response to the garbled expression of his right to retain counsel uses the very syntax that the Judge used in presenting the misstatement of the law to petitioner, potentially confirming petitioner's misunderstanding of the rights which were his. The Judge purportedly said in one transcript, "you are not authorized to have such a person [an attorney], you can go ahead without one and speak for yourself." Petitioner, using the same language and syntax, responded, "I will speak for myself."²

The truly indisputable alternatives presented to petitioner were to proceed without counsel, as he was not "authorized" to have

(2) The translation process itself, (1) the Judge's language being translated into Chinese, (2) expressed to petitioner, (3) petitioner's Chinese response, (4) finally translated into English, is a delicate procedure at best if meanings are not to be lost. With two contradictory versions, it strains credulity to expect a translator to once again translate conversations which occurred two years ago with any semblance of accuracy.

one, but, nevertheless, to "speak for himself", or, in the alternative, to proceed without an attorney and say nothing. To further conjure that this exchange constitutes a knowledgeable, intelligent, or voluntary waiver is a veneer and strategy based on obfuscation of facts.

That respondents offer to reproduce a third transcript for this Court as respondents stated they would, but failed to do, prior to the Habeas Corpus Hearing, insults the integrity of this appeal. It further evidences respondents' own admission that they failed to comply with the strict statutory mandate that "[d]etermination of deportability in any case shall be made only upon a record," 8 U.S.C. § 1252(b), not upon the United States Attorney's crystal ball gazing.

ARGUMENT

POINT ONE: Respondent Has Conceded the Defective Nature of Procedural Aspects of the Deportation Hearing and Such Defects Constitute Plain Violations of Statutory and Regulatory Mandates Depriving Petitioner of Due Process of Law.

A. Due Process Requirements Are Not Eviscerated by Congressional Power to Regulate Alien Immigration.

Respondents' reliance on Fiallo v. Bell, 45 U.S.L.W. 4402 (U.S. April 26, 1977) for the implied proposition that due process at a deportation hearing is somehow a denuded notion of "only" fairness is inaccurate. Fiallo concerns a direct constitutional challenge of a Congressional Act. In the court's words, "it is important to underscore the limited scope of judicial inquiry into immigration legislation." The court noted that appellants in that case did "not challenge the need or special judicial deference to congressional policy choices in the immigration context."

Where procedural due process is challenged, however, the Supreme Court has always been as vigorous as this Circuit in its protection:

Even one whose presence in this country is unlawful, involuntary, or transitory, is entitled to that constitutional protection [cit. omitted] that protects every one of these persons [aliens] from deprivation of life, liberty, or property without due process of law. [cit. omitted]" Mathews v. Diaz, 426 U.S. 67, 77 (1976). See also, Robert E. Hampton, Ch'm'n. United States Civil Service Comm., et al. v. Mow Sun Wong, 426 U.S. 88 (1976).

That respondents further cite The Japanese Immigrant Case, 189 U.S. 86 (1902) in which Justice Harlan states, "this Court has never held, nor must we now be understood as holding that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law'" is startling. The Third Circuit cites the case as follows:

"An alien subjected to deportation proceedings is entitled to due process of law. The Japanese Immigrant Case, 189 U.S. 86 (1903)." Chlomos v. INS, 516 F.2d 310 (3rd Cir. 1975).

Nor is it surprising that Bridges v. Wixon, 326 U.S. 136, 154 (1945) is carefully tucked in a lengthy footnote. (Respondents' Brief, p. 21, n. 33).

"We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty--at times a most serious one--cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

Respondents' statement that deportation in petitioner's case is somehow peculiarly exempt from the above constitutional limitations because as a non-immigrant crewman the "deportation could hardly be either substantial or unforeseen," (Respondents' Brief, p. 19, n. 31) is, with all due respect, pure whim.

Due process requirements at an administrative procedure at which a liberty is at stake cannot and has never been defined by the misdescribed merits of any given case.

The issues properly framed are the "educational attainment" of a respondent, Goldberg v. Kelly, 397 U.S. 254, 268 (1970), the need for skill in evaluating the complexity of the rights at stake, Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973), the "nature" of the liberty or property interest in question, Goss v. Lopez, 419 U.S. 565, 575-576 (1974); Board of Regents v. Roth, 408 U.S. 564, 570-571 (1972), and a resultant decision as to how best to balance the factors.

"Once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

As the Supreme Court has consistently termed deportation "a great hardship", Bridges v. Wixon, supra, at 154, and a "drastic deprivation", Woodby v. INS, 385 U.S. 276, 285 (1967), it is misleading and erroneous to sweep away the above case and glibly assert that petitioner's deportation is "hardly. . .substantial" (Respondents' Brief, p. 19, n. 31) and, therefore, not subject to "rigid due process requirements." (Respondents' Brief, p. 19). As the touchstone of due process is flexibility:

The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. [cit. omitted] Goss v. Lopez, supra, at 578; see also, Barthold v. INS, 517 F.2d 689, 691 (5th Cir. 1975),

it is apparent that respondents' eschewing rigidity is well in line with the law, although not in the manner suggested by it in its brief, as an avenue to escape violation of a myriad of regulatory mandates somehow not required by "rigid" due process.

B. The Immigration Judge's Bald Misstatement of Petitioner's Right to Retain Counsel in One of Two Contradictory Transcripts Violates Due Process.

1. Failing to Keep One Accurate Record

"[D]etermination of deportability in any case shall be made only upon a record. . . ." 8 U.S.C. § 1152(b).

Reinforcing this congressional emphasis, respondents' regulation requires a verbatim record be made. 8 C.F.R. § 242.15.

Although respondents have not argued that production of not one, but two transcripts doubly fulfills the goal, it cannot be overstressed that such an event denigrates the Congressional intent and constitutes a violation of Constitutional dimension.

In Griffin v. Illinois, 351 U.S. 12 (1951), the Supreme Court held that even where there is no constitutional right to appeal, once the right is granted it cannot be done "in a way that discriminates against some convicted defendants on account of their poverty" by depriving poor appellants of a record. Griffin v. Illinois, supra, at 18. The gravamen of the holding was that such deprivation of record was invidious discrimination. It has long been settled that aliens are protected from such invidious actions. Wong Wing v. U.S., 163 U.S. 228 (1896); Yick Wu v. Hopkins, 118 U.S.

356 (1886); Acevedo v. INS, 538 F.2d 918, 919 (2d Cir. 1976); Noel v. Chapman, 508 F.2d 1023, 1030 (2nd Cir. 1975).

The discrimination visited upon this petitioner is no less invidious than that which indigent defendants suffered before Griffin. It is not in accordance with rudimentary notions of "fair play" to force petitioner to pick his way through contradictory transcripts and be subjected to respondents' extrasensory extrapolations and extra-judicial conversations with interpreters as to the accuracy of a record whose inaccuracy violates clear statutory and regulatory mandates.

2. No Waiver of the Right to Counsel Can
Be Gleaned From Either Transcript

Petitioner's Counterstatement of Facts splays out respondents' misconstruction of the transcripts and is not repeated here. The allegation of waiver, however, is not only factually unsupported but a legal fabrication.

Respondent contends that although the right to counsel has been "enforced strictly" by the Third and Seventh Circuits (Respondents' Brief, p. 23, n. 34), this Circuit "apparently has adopted the doctrine of prejudicial error." (Id.) Nothing could be further from the truth.

Initially, respondents' fractured reasoning posits that petitioner has waived his right to retain counsel because he allegedly was not prejudiced by not having counsel provided at government expense, a non sequitur already commented upon by the Third Circuit. See, Chlomos v. INS, supra, at 314.

Henrique v. INS, 465 F.2d 119 (2nd Cir. 1972), the first miscited case by respondents, concerned an indigent's claim to representation by counsel as a matter of due process at a deportation hearing where "counsel, even if furnished, could not have obtained any other result", a hearing described by this Court as "the least favorable factual framework which could be devised for raising the very serious and important constitutional claim here made."

Henrique v. INS, supra, at 121, n. 3.

The instant case concerns being informed of the right to retain counsel, not being deprived of government paid counsel and bears little relevance to Henrique.

Directly on point, however, is Ballenilla-Gonzalez v. INS, 546 F.2d 515 (2nd Cir. 1976), which specifically affirms that petitioner's claims to due process violations must be "reached":

To reach the question of the extent of petitioner's statutory and constitutional rights to counsel, however, we would have to find that she did not herself waive any such rights. This we cannot do. As required by 8 C.F.R. § 242.16, the Special Inquiry Officer informed petitioner of her right to counsel at no expense to the government and asked her whether she wished to proceed with or without a lawyer. Petitioner was undecided but, believing that she could not be deported since she had given birth to an American child, ultimately decided that she would proceed without one. Thus she clearly waived any right to a lawyer, albeit on a mistaken impression of the law. We are not prepared to state that every waiver of a right to counsel given under a misapprehension of the state of the law must be upheld as valid. However, where (as here) a potential deportee, after obtaining qualified legal counsel, fails even to allege facts

which could, had an attorney been available to aid in their proof, have changed the outcome of the hearing, such a waiver will be deemed effective. (emphasis supplied).

This Court stated in a footnote to the above passage that "[w]hether the same standard [Henrique v. INS, supra] would apply in a case of denial of a potential deportee's statutory right", (as claimed in the instant case), "we need not decide," at 520, n. 10.

Thus, this Circuit has specifically not ruled on the issue herein, despite respondents' self-styled "prejudice rule" gleaned from a factually inapposite context, a confusion seen before by circuit courts. Chlomos v. INS, 516 F.2d 310, 314 (3d Cir. 1975).

3. Failing to Inform Petitioner of a Right to Retain Counsel Violated Statutory, Regulatory and Constitutional Requirements.

Specifically on point, petitioner asks this Court to follow the holding of the Fifth Circuit that failing to advise petitioner of his right to retain counsel violates due process. Barthold v. INS, 517 F.2d 689, 691 (5th Cir. 1971).

Petitioner asks the Court to rule in congruence with the Seventh Circuit, which has held that denial of the statutory right to retain counsel by disallowing a continuance to obtain one (or failing to properly advise of the right to begin with as in this case) violates due process. Casteneda-Delgado v. INS, 525 F.2d 1295 (7th Cir. 1975).

The Judge never succinctly informed petitioner of his right to retain counsel regardless of which transcript is accurate.

Telling petitioner what he was not "forced" or "authorized" to do is a far cry from simply informing him of what he could do and had a right to do. If the rights in 8 C.F.R. 242 were all given by informing a deportee that he is not "forced" to be present, or "forced" to have a record, the regulatory scheme would quickly be swept entirely under the rug in favor of sub rosa proceedings bearing little resemblance to the procedural plans contemplated by the framers of the regulations.

The Judge was required by regulation to restate the right to retain counsel at the hearing. 8 C.F.R. § 242.16. It is unreasonable to allow respondents to sidestep this requirement by arguing that a prior written appraisal of the right to counsel directed at petitioner a month before the hearing, as it appears in English on the reverse side of the Order to Show Cause, fulfills the regulation. The written notice was supposedly translated "verbatim" to petitioner with the same efficacy that has produced two transcripts of the hearing to date. Such "notice" in any event would not reasonably survive the Judge ~~mis~~informing petitioner that he was not "authorized" to obtain counsel.

To compare the instant exchange between the Judge and petitioner with that which appears in Burquez v. INS, 513 F.2d 751 (10th Cir. 1975), and glean a comparison favorable to respondents' position is not justified although respondents attempt to do so. (Respondents' Brief, p. 27, n. 41). The trial judge there stated in

simple expository style: "You have a right to be represented by an attorney by any person authorized to practice in these proceedings. Do you understand." [Answer] "Yes."

In this case the judge explained the right to counsel and then explained it away on one transcript as not "authorized" and not "forced" on another. In plain English, on one transcript, the Judge told petitioner that there was generally a right to counsel, but not for Der-rong Chour, petitioner herein.

It seems hardly necessary to add that if this Court raises the right to counsel to a constitutional dimension, the instant record patently fails to reflect the "knowing, voluntary and intelligent" relinquishment of a constitutional right:

Presuming waiver [of the right to counsel in criminal proceedings] from a silent record is impermissible. Carnley v. Cochran, 369 U.S. 506, 516 (1962); see, Miranda v. Arizona, 384 U.S. 436, 44, 467-477 (1966).

To contend waiver from this record where the record is not only not "silent", but where the Judge at one point said there was no right at all, bares complete misapprehension of applicable case law. See, also, Glasser v. United States, 315 U.S. 60 (1942).

C. Failing to Advise Petitioner at the Hearing of His Statutory and Regulatory Rights Deprived Petitioner of Due Process, Violated 8 C.F.R. § 242.16 and Merits a Hearing De Novo.

Respondents contend with respect to Judge Port's failing to inform petitioner at the hearing of his rights to examine evidence against him, to present witnesses, which failure violated 8 C.F.R.

§ 242.16, was unimportant. Respondents argue that the Order to Show Cause handed to Petitioner one month before the hearing, which contained the rights in English on its reverse side, constituted an excusable circumvention of the regulations as the instructions were translated to petitioner. (Respondents' Brief, p. 29).

Respondents further luxuriate in what is described poetically, if inaccurately, as the "quintessence of harmless error", rendering the myriad of regulatory violations immaterial in its eyes.

1. The Regulations Are the Sole and Exclusive Procedure for Determining Deportability

First, respondents must not be permitted to bifurcate the statutory and regulatory requirements. The latter are designed to implement the former. To argue, as do the respondents, that "only" the regulations, not the statute itself, requires the rights to be read at the hearing vitiates the thrust of the statutory mandate conveniently carved out of respondents' arguments:

The procedure so prescribed [i.e., "such regulations"] shall be the sole and exclusive procedure for determining. . .deportability. . . . 8 U.S.C. 1252(b).

Respondents posit that they have a "new" procedure and negate the above exclusivity requirement. Their new procedure is stripped of all regulatory rights due to "quintessential" harmless error. Respondents' position flies in the face of express statutory language and belies plain prejudice on the record.

It is respectfully submitted that the failure of the INS to follow its own administrative rules and regulations, which are

mandated by statute to protect the rights of parties to deportation proceedings, violated petitioner's right to due process of law and requires the order of deportation to be vacated.

The rule was recently invoked in Hupart v. Bd. of Higher Ed. of City of New York, 420 F.Supp. 1087, 1107 (S.D.N.Y. 1976), wherein the Court (per Frankel, D. J.) stated:

It is by now familiar law that an agency's violation of its own regulations may in and of itself constitute a violation of due process. See, e.g., Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); United States v. Leahey, 434 F.2d 7 (1st Cir. 1970); Sangamon Valley Television Corp. v. United States, 106 U.S. App.D.C. 30, 269 F.2d 221 (1959). "An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down." United States v. Heffner, 420 F.2d 809, 811 (4th Cir. 1969). Such deviations "cannot be reconciled with the fundamental principle that ours is a government of laws, not men." Hammond v. Lenfest, 398 F.2d 705, 715 (2d Cir. 1968).

The sweep of the doctrine is broad. Its applicability does not turn upon the formality of the embodiment of the pertinent policy. See, e.g., United States v. Heffner, *supra*, 420 F.2d at 812 (IRS instructions); Smith v. Resor, 406 F.2d 141, 143-44 n.2, 146 (2d Cir. 1969) (Army newsletter); Sangamon Valley Television Corp. v. United States, *supra*, 269 F.2d at 224-25 (usual FCC Practice). Cf. Yellin v. United States, 374 U.S. 109, 116-17, 83 S.Ct. 1828, 10 L.Ed.2d 778 (1963) (prior congressional behavior). This is so because the same "danger of inconsistent treatment also exists when an agency departs from an unpublished rule or informal practice." Note, Violations by Agencies of Their Own Regulations, 87 Harv. L. Rev. 629, 636 (1974). See also, United States v. Heffner, *supra*, 420 F.2d at 812. It is also irrelevant that the policy may be "more generous than the Constitution requires." United States v. Heffner, *supra*. See also, Service v. Dulles, 354 U.S. 363, 388, 77 S.Ct. 1152, 1 L.Ed. 2d 1403 (1959).

There exists here no reason why this wise and just rule should not be applied. Petitioner was, at his hearing, deprived of almost, if not every, right granted by statute³ or rule to persons in his position, and as a result he is currently subject to deportation.

2. Petitioner Was Prejudiced by Imprisonment, Disregard of the Rules of Evidence and His Eligibility for Adjustment of Status Not Being Brought to the Judge's Attention.

As a consequence of the initial finding of the Immigration Judge, petitioner was imprisoned from June 6, 1977 (Administrative Record, 96) until July 19, 1977. Imprisonment is not only "prejudice", its mere possibility is sufficient to make the right to counsel constitutionally mandated at criminal proceedings. Argersinger v. Hamlin, 407 U.S. 25, 37 (1975). Further, the Fifth Circuit specifically noted that Barthold was not incarcerated and would not be incarcerated in declining to reach the constitutional necessity of counsel at a deportation hearing in Barthold v. INS, 517 F.2d 689, 692. Analogously, the prejudice of imprisonment cannot be ignored.

Of greater significance, the Fifth Circuit noted that Barthold himself argued that his return to Haiti would result in persecution (at 690). The present petitioner, ignorant of his refugee status, failed to inform the Immigration Judge that he would be subject to thought reform and imprisonment, were he returned to his home island of Ta-Chen, from which he was flown by American Military Authorities prior to the Communist takeover in 1955.

(3) Such statutes are, of course, to be strictly construed against the INS. Rehman v. Immigration and Naturalization Service, 544 F.2d 71, 74 n.6 (2d Cir. 1976); Lennon v. I.N.S., 527 F.2d 187, 193 (2d Cir. 1975) (wherein the Court stated "It is settled doctrine that deportation statutes must be construed in favor of the alien.")

Of most significance, at the hearing the Judge asked petitioner, in leading form, a question of law, which was for the Judge to decide, not for the petitioner to "admit". Petitioner possessed no knowledge of what deportability standards were relevant, but was nevertheless asked his "legal" opinion. On this point, both transcripts coincide:

"[D]o you admit that the government has the right to deport you?" A-44, A-48.

8 C.F.R. § 242.14 requires that "The Federal Rules of Evidence shall be used as a guide to the extent practicable." The above question, if uttered by a Judge in a Federal District Court, would be patently prejudicial. See, 10 Moore's Federal Practice, Federal Rules of Evidence, 2d Ed. VI-159 et seq. The question is tantamount to asking, "your case is legally without merit, that is what you admit, is it not?", and then ruling against the petitioner because of the "admission". The question in the mouth of a police interrogator is predictable; in the mouth of an Immigration Judge, violative of 8 C.F.R. 242.14, generative of a predictable and meaningless answer and serves to highlight the results of respondents' "new" procedures, where the regulations are ignored in wholesale fashion.

POINT TWO: Petitioner is Eligible for an Adjustment of Status.

A. Respondents Have Misread 8 U.S.C 1255 and Ignored Normal Reentry Procedures for Initially Nonimmigrant Crewmen.

The respondents in this case claim that the petitioner herein cannot adjust his status pursuant to 8 U.S.C. § 1255. In fact,

the Respondents' Brief, on page 34, states that: "As is apparent from the Act, Chour, an alien crewman, is statutorily ineligible to obtain adjustment of status relief."

In fact, however, what section 1255 of title 8 of the U.S. Code does state is that the Attorney General may adjust the status of aliens other than alien crewmen. It does not say that an alien crewman is prohibited from adjusting his status.

The status of an alien, other than an alien crewman, who was inspected and admitted or paroled in the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe. . . . 8 U.S.C. § 1255(a).

The manner in which an alien crewman adjusts his status to that of nonimmigrant person admitted for permanent residence, is to process his application through the Immigration and Naturalization Service, and if necessary, first through the Labor Department, and after a favorable adjudication in the United States, to adjust his status outside the United States at an American Embassy or Consulate either in his home country, or in Canada. This practice, which is common and has been employed by numerous alien crewmen, is clearly available to the petitioner in this case, and he, like many immigrant seamen, can adjust his status and lawfully remain in the United States pending said adjustment.

The ready availability of the procedure can readily be seen from the testimony of the Hon. Leonard R. Walentynowicz, Administrator of the Bureau of Security and Consular Affairs, U. S. Department of

State, on April 7, 1976, before the House Subcommittee on Immigration, Citizenship and International Law. Nonimmigrant Visas: Requirements and Procedures: Hearing Before the Subcommittee on Immigration, Citizenship, and International Law, 94th Cong., 2d Sess. (1976). (Hon. Leonard R. Walentynowicz). The frequency and ease with which such Canadian visas are obtained is readily ascertainable from Appendix C to the Hearing transcript, which reveals that the Toronto Consulate spent an average of 14 minutes in processing some 67,091 nonimmigrant visas in 1975. As noted on the record, the petitioner has received labor certification as a mechanic.

The Secretary of State is empowered to establish and administer a visa office, under the Bureau of Security and Consular Affairs (8 U.S.C. § 1104(b)(c)), to enforce relevant immigration and nationality laws except those conferred upon consular officers relating to the granting of visas (8 U.S.C. § 1104(a)).

Under the Code of Federal Regulations:

(a) An alien shall be classified as a sixth preference immigrant under section 203(a)(6) of the Act if the consular officer has received from the Immigration and Naturalization Service a petition filed on the applicant's behalf by a prospective employer and validly approved in accordance with section 204 of the Act. 22 C.F.R. 42.35.

A person entering the United States as a seaman or crewman is not ineligible to obtain an immigrant visa from a consular officer under these provisions of the Code. (See Aliens Ineligible To Receive Visas, 22 C.F.R. § 42.91.) Thus the petitioner-alien is

eligible to receive a visa pursuant to a sixth preference application filed by a prospective employer. Such application requires the certification by the Secretary of Labor that there are insufficient qualified American workers for the job and the employment of said alien will not adversely affect wages of American workers (22 C.F.R. 42.91 (14)). Documents evidencing the processing of the labor certification in this case was presented to the Board of Immigration Appeals, who failed to consider it in their decision.

B. Petitioner is Married to a Resident Alien.

Petitioner is presently married to a resident alien, and as such, is eligible for a Second Preference. INA § 203(a)(2). The marriage of petitioner after the hearing can be considered by the respondents on remand. Chlomos, at 314, n. 6.

C. Petitioner is a Refugee from Communist China
Flown Out of Ta-Chen by United States Military
Authorities in 1955.

Petitioner was evacuated from Ta-Chen Island, off the coast of Chekiang Province, China, under control of the communists since 1955. His evacuation was in part at the behest of the American Military authorities. Petitioner would be subject to imprisonment and thought reform if returned. Petitioner is thus eligible for a Seventh Preference application as defined in § 203(a)(7) of the Immigration and Nationality Act of 1952, as amended. But see, Rosenberg v. Yee Chien Woo, 402 U.S. 49 (1970).

D. President Carter's Proposal to Congress

President Carter has very recently (July 19, 1977) made legislative proposals concerning the Regulation of Undocumented Aliens in which he urges the creation of a new immigration category. This category would be called "temporary resident alien", and would apply to all undocumented aliens who have resided in the United States continuously prior to January 1, 1977. Under President Carter's proposal, eligible aliens would, upon registering with the INS, be granted the temporary resident alien status for five years. After being granted this new status, an alien would be able to reside legally in the United States for a five-year period. 123 Cong. Rec. S13826 (President Carter) (August 4, 1977).

Petitioner in the instant case is clearly within the ambit of President Carter's proposal, as he has been residing in the United States continuously since on or about February 10, 1974.

It should also be noted that the Immigration and Naturalization Service in Washington, D. C. has suspended deportation hearings in cases involving aliens within the aforesaid category pending Congressional decision on President Carter's proposal.

CONCLUSION

The petition for review should be granted and the decision of the District Court should be reversed.

Dated: New York, New York
October 7, 1977

Respectfully submitted,

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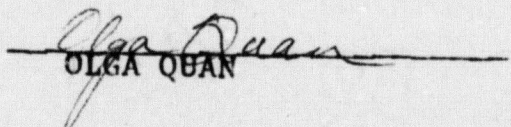
AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

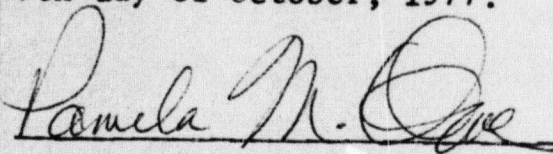
OLGA QUAN, being duly sworn, deposes and says:

1. Deponent is not a party to the within action, is over 18 years of age, and resides at 27 East 37th Street, New York, New York.

2. On October 7, 1977 deponent served a true copy of the Reply Brief Of Petitioner upon Robert S. Fiske, Jr., Esq., United States Attorney for the Southern District of New York, at One St. Andrew's Plaza Annex, New York, New York 10007, Attention: Robert S. Groban, Jr., Esq., by depositing same in a post-paid properly addressed wrapper in an official depository under the exclusive care of the United States Post Office in and for the City of New York, New York.


OLGA QUAN

Sworn to before me this
7th day of October, 1977.



PAMELA M. OWEN
NOTARY PUBLIC, State of New York
No. 24-4626837
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1978

